

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Pilgrim Telephone, Inc. for arbitration of certain issues in interconnection agreement with BellSouth Telecommunications, Inc.

DOCKET NO. 001436-TP
ORDER NO. PSC-01-1207-FOF-TP
ISSUED: May 30, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER DENYING MOTION TO DISMISS AND DECLINING
TO HEAR PETITION FOR ARBITRATION

Case Background

On September 20, 2000, Pilgrim Telephone, Inc. (Pilgrim) filed a Petition for Arbitration pursuant to the Telecommunications Act of 1934{sic}(Act). On October 16, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed an Answer and Motion to Dismiss the Petition for Arbitration, stating that Pilgrim is not a telecommunications carrier under the Act. On November 3, 2000, Pilgrim filed a response opposing BellSouth's Motion to Dismiss. We are vested with jurisdiction in this matter pursuant to Section 252(b)(1) of the Telecommunications Act of 1996.

Analysis

The function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993) In determining the sufficiency of the petition, we confine our consideration to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st

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REGISTRATION REPORTING

DCA 1958). Pilgrim's Complaint should be viewed in the light most favorable to Pilgrim, in order to determine whether its request is cognizable under the Telecommunications Act of 1996 (Act) and Florida Statutes. Furthermore, we shall construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Mathews v. Mathews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

BellSouth's Motion

BellSouth asserts in its motion to dismiss that our obligation to conduct an arbitration is to enforce the duties imposed upon ILECs by Section 251(c) of the Act. BellSouth states that this Section is applicable only to telecommunications carriers. Telecommunications carriers are defined under Section 3(a)(49) of the Act as "any provider of telecommunications services. . . ." "Telecommunications service" is defined in Section 3(a)(51) as "the offering of telecommunications for a fee directly to the public. . . ." BellSouth also asserts that in Florida, these services may be provided directly to the public only upon a company obtaining certification through us. By not becoming certificated in Florida, and therefore being unable to provide telecommunications services, BellSouth argues that Pilgrim is not a telecommunications carrier, and is not entitled to arbitration under the Act.

Pilgrim's Response

Pilgrim states in its Petition for Arbitration that it is a Massachusetts corporation offering a variety of interstate, interexchange services, including presubscribed 1+ services, casual calling common carrier services, and information and enhanced services. It notes that it provides presubscribed 1+ services only in the Local Access and Transport Area (LATA) in Massachusetts. Pilgrim states that it plans to offer local exchange telecommunications services, although it does not specify where. Pilgrim argues in its response to the motion to dismiss that there are no geographic parameters or requirements to the definition of telecommunications carriers. Pilgrim also asserts that providing telecommunications services in the United States is the only statutory threshold for eligibility to request negotiations with incumbent LECs under Section 252(a)(1) of the Act, and to file arbitration petitions under Section 252(b)(1). Pilgrim cites the

FCC's Local Competition Order for support, noting that as part of a duty to negotiate in good faith, "a party may not condition negotiation on a carrier first obtaining state certification." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15577 (para. 154) (1996).

Pilgrim also argues that there are significant policy reasons for permitting it to file an arbitration petition before completion of the carrier certification process. Pilgrim states that it is more efficient to permit competitive telecommunications carriers to pursue the two tracks of reaching interconnection agreements with the incumbent LECs and of obtaining certification from state commissions, without being required to sequence the two steps. Pilgrim further alleges it may also be more difficult for a carrier to complete the certification process until the carrier has finalized its interconnection arrangements. The types of services represented for offering in the certification application, as well as the price list, can be affected by the nature of the interconnection agreement with the incumbent LEC. Finally, Pilgrim acknowledges that we may incur unwarranted administrative costs by permitting an uncertificated telecommunications carrier to file an arbitration petition, but it believes that the risk is not substantial as the carrier is likely to become certificated.

Motion to Dismiss

In order to sustain a motion to dismiss, the moving party must show that the petition fails to state a cause of action for which relief may be granted. All allegations in the petition should be taken as though true, and considered in the light most favorable to the petitioner. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983). Pilgrim's petition states that Pilgrim provides, among other offerings, a variety of interstate, interexchange services, including presubscribed 1+ services. On April 14, 2000, Pilgrim requested that BellSouth negotiate an interconnection agreement with Pilgrim. Negotiations did not produce agreement on all issues, and on September 20, 2000, Pilgrim filed the request for arbitration. Pilgrim's petition for arbitration is therefore timely pursuant to Section 252(b)(1) of the Act, and properly sets forth the issues it considers in dispute, and the position of the parties.

BellSouth's motion to dismiss is predicated for the most part on its assertion that because Pilgrim is not certificated in Florida, it does not meet the definition of a "telecommunications carrier." Under this premise, BellSouth has no Section 251 duty to allow Pilgrim to interconnect with BellSouth's network, or to obtain nondiscriminatory access to network elements on an unbundled basis. By virtue of it not being a telecommunications carrier, Pilgrim is not entitled to utilize arbitration to enforce nonexistent obligations. Pilgrim's failure to become certificated in Florida does not, however, dissolve its standing as a telecommunications carrier under the Act. The Act does not define a telecommunications carrier in terms of the geographic area it serves, and in the broadest sense Pilgrim satisfies the definition of a telecommunications carrier.

As for BellSouth's second defense, this actually constitutes BellSouth's answer to the Petition for Arbitration. There, BellSouth reiterates the assertion that Pilgrim is not certificated in the State of Florida, provides background on the path to arbitration, and sets forth its disputed issues and the positions of the parties. It does not propound any further argument which satisfactorily challenges Pilgrim's cause of action. For these reasons, and applying the aforementioned standard, we find that Pilgrim states a cause of action for which relief may be granted.

Declining to Hear Arbitration

While this is an issue of first impression, we believe that there are significant policy reasons why we should decline to hear Pilgrim's Petition at this time. Requiring that parties shall be certificated in Florida prior to seeking arbitration by this Commission is within our jurisdiction, as set forth in Section 253(b) of the Act, which allows the State, through this Commission, "to impose, on a competitively neutral basis...requirements necessary to...protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." We believe that having parties obtain certification prior to arbitration protects the public welfare by not utilizing our time, resources, and monies on arbitrations, where there is no indication that a party will become certificated to provide telecommunication services to Florida consumers. The certification process is an important element in ensuring the

continued quality of telecommunications services, by bringing companies and their agreements under the jurisdiction, review, and enforcement provisions of the Commission. As such, it serves to safeguard the rights of consumers in Florida.

Although Pilgrim has had ample opportunity to seek certification to provide telecommunications services to the public in Florida, it has made no attempt to complete certification, although at the time we considered this matter the company indicated it was in the process of completing its application. We note that in Docket No. 991665-TI, Pilgrim filed an application to provide interexchange telecommunications service in Florida. Its application was denied because Pilgrim failed to submit the required tariff information to complete the application. Pilgrim shall not be allowed to pursue the dual track of certification and arbitration, as it appears that it may pursue arbitration, while its certification lies dormant. Certification is a much less burdensome endeavor, both on the parties and on this Commission.

The policy reasons for not arbitrating petitions of uncertificated companies are compelling. It is clear that where there is no indication that a company may ever obtain a certificate to provide any telecommunications service in Florida, engaging in arbitrations involving that company would be a waste of the resources of both the parties involved and ourselves. This line of reasoning is not novel to Pilgrim, and begs the question as to why Pilgrim continues to advance a theory which has been soundly rejected in other states. For example, the Georgia Public Service Commission recognized that its jurisdiction to conduct a Section 252(b) arbitration does not extend to a petitioner that is not a telecommunications carrier. Order Dismissing Arbitration, Docket No. 7270-U, 5/19/97, at 4. While we believe that Pilgrim may be a "telecommunications carrier" under the broad definition within the Act, we have the discretion to require Pilgrim to become certificated in Florida before engaging in arbitration proceedings.

Therefore, we decline to hear Pilgrim's Petition for Arbitration. If Pilgrim becomes certificated in the State of Florida, it may again file a petition for arbitration in accordance with Section 252 of the Act. We note that if Pilgrim believes that an arbitration agreement in Florida is imperative prior to

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certification, it can seek relief from the FCC pursuant to Section 252 (e) (6).

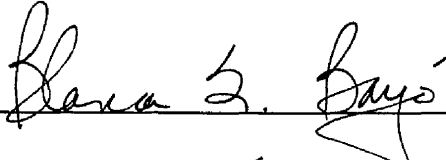
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc's Motion to Dismiss is denied. It is further

ORDERED that the Florida Public Service Commission declines to hear the Petition for Arbitration of Pilgrim Telephone, Inc. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 30th Day of May, 2001.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).